IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2007 Session

TABITHA ANN CAIN v. MARK EDWARD CAIN

Appeal from the Chancery Court for Robertson County
No. 18970 Laurence M. McMillan, Jr., Chancellor

No. M2006-02259-COA-R3-CV - Filed May 16, 2008

Mother appeals trial court granting Father primary residential custody without making the findings about alleged abuse required by Tenn. Code Ann. § 36-6-106(a)(8). Based upon the circumstances of this case, including the fact that this was a divorce in which the court was required to adopt a permanent parenting plan, we conclude that the trial court was not required to make those findings. Applying the factors relevant to a determination of the residential schedule of minor children, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Christine Brasher, Springfield, Tennessee, for the appellant, Tabitha Ann Cain.

Wende J. Rutherford, Nashville, Tennessee, for the appellee, Mark Edward Cain, Jr.

OPINION

Tabitha Ann Cain ("Mother") appeals the part of the Final Decree of divorce entered on September 11, 2006, which gave to Mark Edward Cain ("Father") the majority of residential time and primary decision making authority for the couple's two minor children, a son age 7 and a daughter age 3. According to Mother, the trial court erred when it failed to consider the couple's comparative fitness as parents and failed to make required findings regarding the allegations of abuse leveled at Mother. The parties agreed on the vast majority of the issues surrounding the division of the marital estate and stipulated that grounds for divorce existed.

The parties agreed that Mother was the children's primary caretaker during the marriage. During the nine months before the hearing, both parties lived in Greenbrier, Tennessee, and shared the children on alternate weeks. After the divorce complaint was filed, Father filed two police reports, a Petition for an Order of Protection and three allegations of abuse or neglect against Mother.

The police charges against Mother filed by Father had been dismissed. These charges involved allegedly harassing phone calls and smiling in an "intimidating manner." Father's request for an Order of Protection was likewise denied after hearings were conducted on the issue.

All three allegations of abuse or neglect filed by Father were investigated by the Department of Children's Services and found to be groundless. The first allegation in November of 2005 concerned a neighbor seeing Mother striking her son. The second allegation concerned a bruise Father found on his son after the child had been with his Mother. Finally, Father made a third complaint after Mother allowed their 7 year old son to start her car.

At trial, Mother denied any abuse or neglect on her part. As to the first allegation, she admitted spanking her son. Regarding the bruise, Mother explained that it happened when her son fell on a timber lining the playground. As for allowing the child to start her car, Mother readily acknowledged that she let him do this at her apartment, but stated that Father had begun this practice of allowing the child to start his car.

The Child Protective Services Investigator, Jerrell Summers, investigated Father's allegations of Mother's abuse and neglect and testified at trial. Mr. Summers testified that he interviewed the child, the neighbor, and the parents. Basically, Mr. Summers testified that he believed that the allegations of abuse against Mother were unfounded.

Father also raised an incident when the son and a friend managed to climb a fence surrounding the apartment swimming pool while the children were with Mother. Mother testified that this occurred while she was preparing lunch and her boyfriend was watching the boys. Father argued this incident was evidence of Mother's lack of parenting ability.

The court heard testimony that both Father and Mother dated during their separation. Mother acknowledged that on one occasion her boyfriend stayed all night yet denied that either child was aware of his presence. Father presented evidence that two men Mother dated had both been charged with crimes: stalking and domestic assault.

Mother's proposed parenting plan suggested that the parties maintain the same residential schedule that had existed during the nine months before the hearing, *i.e.*, alternating weeks. Father's proposed plan suggested that he have primary residential placement of the children with Mother having visitation every other weekend.

The trial court made the following findings:

In formulating the permanent parenting plan the court must weigh the best interests of the minor children. The factors the Court considers in finding that it is in the minor children's best interest that the father be designated as the primary residential parent are:

1. That the mother has had married men stay overnight in her home with the minor children present, and that these married men have criminal or pending criminal charges.

2. That based on the mother's testimony that she does not even talk to the father, that the parties are incapable of dealing with one another.

3. That the court is concerned about the bruising of the minor children while in the care of the mother and the tearful testimony of Ms. Bradshaw [the neighbor] that she saw the beating of the minor son at the hands of the mother.

4. That the Court is concerned that the minor son was left unattended at the swimming pool and allowed to start the mother's vehicle outside of the mother's presence at the apartment complex where the mother resides.

As a consequence, Father was designated the primary residential parent with Mother having visitation every other weekend and every Tuesday night. Holidays were generally evenly split between the parents, except Mother is entitled to visitation every fall break. During summer vacation, the children are with each parent for alternating two week blocks. The trial court specified that Father had the major decision making authority for the children. The parenting plan adopted by the trial court prohibited both parents from having unrelated overnight guests of the opposite sex.

Mother appeals claiming that the trial court failed to conduct a comparative analysis of the parents' relative strengths and weaknesses and failed to make the requisite findings required by Tenn. Code Ann. § 36-6-106(a)(8) when child abuse is alleged.

I. STANDARD OF REVIEW

In effect, Mother argues that the trial court failed to comply with Tenn. Code Ann. § 36-6-106(a) since it did not consider or erroneously considered the requisite factors and failed to make the factual finding on the question of abuse required by the statute.

The significance of custody and visitation arrangements are recognized as "among the most important decisions confronting a trial court in a divorce case." *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006) (quoting *Rice v. Rice*, M1998-00973-COA-R3-CV, 2001 WL 812258, at *2 (Tenn. Ct. App. July 19, 2001)); *In re Lamont B., II*, M2004-02027-COA-R3-JV, 2006 WL 1727332, at *3 (Tenn. Ct. App. June 23, 2006) (no Tenn. R. App. P. 11 application filed). In making

such decisions, the needs of the child are paramount with the desires of the parent being secondary. *Chaffin*, 211 S.W.3d at 286. This determination is fact driven and the trial court must consider all of the facts and circumstances involved in reaching its decision. *Id.*

Trial courts have broad discretion to make custody decisions but those determinations must be made based on proof and applicable principles of law. *Chaffin*, 211 S.W.3d at 286; *D.v.K.*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Given the discretion involved and the fact that the decision often hinges on witness credibility, our court has stated that "appellate courts are loathe to second-guess a trial court's conclusion." *Chaffin*, 211 S.W.3d at 286; *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). The trial court's findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re C.K.G.*, 173 S.W.3d 714, 731 (Tenn. 2005); *Bah v. Bah*, 668 S.W.2d 663, 665 (Tenn. 1983). No presumption of correctness applies to the trial court's conclusions of law. *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001).

II. REQUIRED FINDINGS

Mother's argument that the trial court failed to make findings that are required by statute is based on Tenn. Code Ann. § 36-6-106(a)(8). That statute, by its own terms, applies to cases wherein the trial court is required to make a custody determination regarding a minor child, Tenn. Code Ann. § 36-6-106(a), and includes the nonexclusive list of factors the court is to consider in making a custody determination. Tenn. Code Ann. § 36-6-106(a)(1) - (10). Among those factors is:

> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; provided, that where there are allegations that one (1) parent has committed child abuse, as defined in § 39-15-401 or 39-15-402, or child sexual abuse, as defined in § 37-1-602, against a family member, the court shall consider all evidence relevant to the physical and emotional safety of the child, and determine, by a clear preponderance of the evidence, whether such abuse has occurred. The court shall include in its decision a written finding of all evidence, and all findings of facts connected thereto. In addition, the court shall, where appropriate, refer any issues of abuse to the juvenile court for further proceedings;

Tenn. Code Ann. § 36-6-106(a)(8).[1]

It is obvious that the trial court herein was required to consider the evidence regarding the actions Father characterized as abuse. The question is whether the trial court was required to make a written finding as to whether abuse actually occurred. Where the circumstances fit the statutory language so that a finding is required, the failure to include that finding will result in the reviewing court remanding the case back to the trial court for the requisite determination. *Nelson v. Nelson*, 66 S.W.3d 896, 903 (Tenn. Ct. App. 2001) (portion of statute requiring finding is "mandatory");

[1]Tenn. Code Ann. § 36-6-106(a)(8) was amended in 2007 with minor changes and was not applicable to the proceedings below held in September of 2006.

Hepler v. Hepler, M2004-00530-COA-R3-CV 2005 WL 2777335, at * 4-5 (Tenn. Ct. App. Oct. 25, 2005) (no Tenn. R. App. P. 11 application filed).

The first question, therefore, is whether the requirements that the court determine "whether such abuse occurred" and make written findings supporting that determination apply to the type of allegations made by Father herein. Specific findings are required "where there are allegations that one (1) parent has committed child abuse . . . against a family member." Although the language of subsection (8) could be clearer, we conclude that "family member" includes the child who is the subject of the parenting dispute. Consequently, if the allegations made by Father meet the requirements of child abuse as defined in Tenn. Code Ann. § 39-15-401 or § 39-15-402,[2] then the determination of whether child abuse occurred and findings regarding that determination would be required by Tenn. Code Ann. § 36-6-106(a)(8), to the extent that statute is applicable.

Before the trial court, Father claimed that Mother abused their son based on the neighbor witnessing Mother striking the child and based on the child, at another time, having a bruise. Father argues on appeal that the trial court was not required to make written findings about abuse since he made no allegations of abuse as defined in the statutes. While Father did not cite or rely on either Tenn. Code Ann. § 39-15-401 or § 39-15-402 in this case, he did file complaints or charges against Mother and presented evidence at the hearing on the allegedly abusive conduct. We do not believe that the trial court can avoid the requirements regarding findings on the issue of abuse, or that Father can escape the consequences of his allegations, simply because the statutes defining child abuse were not cited in his pleadings. Instead, we must examine those statutory definitions and determine whether the conduct alleged by Father meets the definition.[3]

Tennessee Code Annotated § 39-15-402, defining aggravated child abuse, by its clear language does not apply to the allegations made by Father. Tenn. Code Ann. § 39-15-401(a) states that any person who knowingly treats a minor child "in such a manner as to inflict injury" commits child abuse. However, under subsection (c)(1), no charge of violating subsection (a) may be brought against a parent based upon an allegation of unreasonable corporal punishment without either a report from a law enforcement officer or independent medical verification of injury. We conclude, therefore, that the allegations made by Father did not require the specific findings set out in Tenn. Code Ann. § 36-6-106(a)(8).

In fact, there is some question as to whether Tenn. Code Ann. § 36-6-106 even applies in this case. That is because the divorce herein occurred after the effective date of the parenting plan legislation, Tenn. Code Ann. §§ 36-6-401 *et seq.* Pursuant to Tenn. Code Ann. § 36-6-404(a), any final decree in an action for absolute divorce involving a minor child must incorporate a permanent

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[2] Because there was no allegation of child sexual abuse in this case, it is not necessary to refer to the part of the statute referencing child sexual abuse as defined in § 37-1-602.

[3] This analysis is not for the purpose of determining whether there was abuse. Indeed, that determination is for the trial court to make, if the allegations are sufficient to trigger the findings requirement of Tenn. Code Ann. § 36-6-106(a)(8). The question to us is whether Father alleged conduct that, if proved, could constitute abuse under Tenn. Code Ann. §§ 39-15-401 or -402.

parenting plan. A parenting plan is defined in Tenn. Code Ann. § 36-6-402(3) as "a written plan for the parenting and best interests of the child, including the allocation of parenting responsibilities and the establishment of a Residential Schedule."[4]

Under the legislation, the court is to determine a residential schedule, which designates the primary residential parent and designates in which parent's home the child will reside on given days during the year. Tenn. Code Ann. § 36-6-402(5). A residential schedule is defined as:

> . . . the schedule of when the child is in each parent's physical care, and it shall designate the primary residential parent [the parent with whom the child resides more than 50% of the time]; in addition, the residential schedule shall designate in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria of this part; provided, that nothing contained herein shall be construed to modify any provision of § 36-6-108;

Tenn. Code Ann. § 36-6-402(5).

Thus, the parenting plan legislation does not use the terms "custody" or "visitation," but instead establishes a parenting arrangement based on a schedule of when the child will reside with each parent. While the parenting plan legislation did not explicitly repeal the prior statutes on

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[4]According to Tenn. Code Ann. § 36-6-404(a), a permanent parenting plan shall:

> (1) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for further modifications to the permanent parenting plan;
> (2) Establish the authority and responsibilities of each parent with respect to the child, consistent with the criteria in this part;
> (3) Minimize the child's exposure to harmful parental conflict;
> (4) Provide for a process for dispute resolution, before court action, unless precluded or limited by § 36-6-406; . . .
> (5) Allocate decision-making authority to one (1) or both parties regarding the child's education, health care, extracurricular activities, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in this part. Regardless of the allocation of decision making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child.
> (6) Provide that each parent may make the day-to-day decisions regarding the care of the child while the child is residing with that parent.
> (7) Provide that when mutual decision making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the appropriate dispute resolution process, subject to the exception set forth in subdivision (a)(4)(F) . . . .

custody and visitation,[5] it is clear that the legislature intended that courts (1) adopt permanent parenting plans in all divorces involving minor children; (2) not award "custody" or "visitation" in cases where a parenting plan is required; and (3) apply a specific set of factors, included in the parenting plan legislation, when approving or designing a permanent parenting plan. *See* Tenn. Code Ann. § 36-6-404(b). The factors that the court is explicitly directed to consider regarding a permanent parenting plan apply herein and in other cases where the court is statutorily required to enter a parenting plan, not the factors set out in Tenn. Code Ann. § 36-6-106(a)(1) - (10), which explicitly apply to custody determinations. While there is little substantive difference in the two sets of factors as far a comparative fitness is concerned, the issue in the case before us requires that we examine the parenting plan statutes for any requirement of specific findings comparable to that in Tenn. Code Ann. § 36-6-106(a)(8).

Among the factors the court must consider when fashioning or approving a residential schedule is "evidence of physical or emotional abuse to the child." Tenn. Code Ann. § 36-6-404(b)(12). However, that provision does not require the court to determine whether abuse occurred and does not require specific written findings.

According to its terms, the factors in Tenn. Code Ann. § 36-6-404(b) come into play, however, only if the limitations found in Tenn. Code Ann. § 36-6-406 are not dispositive of the residential schedule. Tenn. Code Ann. § 36-6-404(b). Tennessee Code Annotated § 36-6-406 instructs a court to limit the residential time of a parent "if it is determined by the court, based upon a prior order or other reliable evidence," that a parent has engaged in certain specified conduct or exhibits certain traits, including, but not limited to: (1) willful abandonment; (2) physical or sexual abuse; (3) emotional abuse; (4) neglect or nonperformance of parental duties; or (5) an emotional or physical impairment which interferes with parental responsibilities. There is no explicit requirement for written findings in this section either. However, the trial court should make a finding that the conduct occurred before limiting a parent's residential schedule. In the case before us, however, since Mother's residential time was not limited as described in Tenn. Code Ann. § 36-6-406 then no such finding by the trial court was required.

In this case, it is clear that the trial court considered evidence of abuse since the court specifically discussed the bruising and the neighbor's testimony about the altercation with the child in the car. The trial court's failure to make specific findings about whether this abuse occurred does not require remand in this case because the circumstances herein did not trigger the application of Tenn. Code Ann. § 36-6-106(a)(8). Additionally, the statute applicable to a residential schedule in a permanent parenting plan, as was adopted herein, does not require specific findings of the type Mother insists should have been made.

III. CONSIDERATION OF RELEVANT FACTORS

[5]There are situations where the custody statutes still apply. For example, Tenn. Code Ann. § 36-6-404(a) does not include parentage orders, as opposed to divorce decrees, in the requirement for a parenting plan; nor does that requirement apply to agreed orders of modification of a custody order entered in a divorce prior to July 1, 1997.

In choosing which parent to designate as the primary residential parent, the court is to undertake a "comparative fitness analysis." *In re C.K.G.*, 173 S.W.3d at 731; *Bah*, 668 S.W.2d at 666; *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App. 1995). On appeal, the parties argue that the factors to be considered to determine which parent is comparatively more fit are those described in Tenn. Code Ann. § 36-6-106(a). However, as discussed above, the relevant factors for purposes of designing a residential schedule, are those set out in Tenn. Code Ann. § 36-6-404(b), the provision governing permanent parenting plans.

There is little substantive difference in the two sets of factors, and we find no difference relevant to the outcome of the case before us. *Burden v. Burden*, E2006-01466-COA-R3-CV, 2007 WL 2790674, at *7 (Tenn. Ct. App. Sept. 26, 2007) (no Tenn. R. App. P. 11 application filed) (determination of custody made in accordance with the factors in Tenn. Code Ann. § 36-6-106 and Tenn. Code Ann. § 36-6-401); *Eastman v. Eastman*, M2006-01134-COA-R3-CV, 2007 WL 1227042, at *2 (Tenn. Ct. App., April 25, 2007) (no Tenn. R. App. P. 11 application filed) (factors in the two statutes are "substantially similar"); *Gervais v. Gervais*, M2005-01483-COA-R3-CV, 2006 WL 3258228, at *7 fn 9 (Tenn. Ct. App. Nov. 9, 2006) (no Tenn. R. App. P. 11 application filed) (many of the factors in the two statues are "identical" and there was no issue in that case that "require[s] reconciliation of any difference"); *Murr v. Murr*, M2005-01377-COA-R3-CV, 2006 WL 2523971, at *3 (Tenn. Ct. App. Aug. 31, 2006) (no Tenn. R. App. P. 11 application filed) ("little practical difference" between the two statutes).

While the trial court is obligated to consider the appropriate factors in reaching its decision, the trial court is not required to list each factor with the court's conclusion about how that factor impacted the custody decision. *Woods v. Woods*, M2006-01000-COA-R3-CV, 2007 WL 2198110, at *2 (Tenn. Ct. App. Jul. 26, 2007) (no Tenn. R. App. P. 11 application filed); *Matlock v. Matlock*, M2004-01379-COA-R3-CV, 2007 WL 1452691, at *5 (Tenn. Ct. App. May 16, 2007) (no Tenn. R. App. P. 11 application filed) (citing *Bell v. Bell*, W2004-00131-COA-R3-CV, 2005 WL 415683, at *5 (Tenn. Ct. App. Feb. 22, 2005)). Consequently, the trial court's failure to specifically address each factor is not grounds for reversal.

The factors to be considered in adopting a residential schedule, as set out in Tenn. Code Ann. § 36-6-404(b), are:

> (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society that the child faces as an adult;
>
> (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
>
> (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;

(4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;

(5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;

(6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;

(7) The love, affection, and emotional ties existing between each parent and the child;

(8) The emotional needs and developmental level of the child;

(9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;

(10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;

(11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

Given the record before us and the standards we must apply on appeal, we find no basis to reverse the trial court's finding that Father should be the child's primary residential parent.

Consequently, the trial court is affirmed. Costs of this appeal are taxed to the appellant, Tabitha Ann Cain, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE